Supreme Court, U.S.
FILED
JUN 12 2006
OFFICE OF THE CLERK

No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

SUPPLEMENTAL BRIEF FOR PETITIONERS 1

CONCLUSION 3

TABLE OF AUTHORITIES

Case: **Page**

Verizon Communications, Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)..... 2

Miscellaneous:

Paul Atkins, *A Serious Threat To Our Capital Markets*, WALL STREET JOURNAL, June 10, 2006, at A12 .... *passim*

SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this supplemental brief pursuant to Rule 15.8 to call the Court's attention to an article written by SEC Commissioner Paul Atkins, published after petitioners filed their reply briefs. In that article, which is reproduced in an addendum to this brief, Commissioner Atkins stated that "[t]he Supreme Court needs to resolve the issue of antitrust immunity" presented in this case in order to "tur[n] back" a "serious threat to our capital markets." Paul Atkins, *A Serious Threat to Our Capital Markets*, WALL STREET JOURNAL, June 10, 2006, at A12.

Specifically addressing this case, Commissioner Atkins explained that plaintiffs' "legal gambit" of seeking "to trump the securities laws with the antitrust laws" evades the limitations that Congress adopted in the Private Securities Litigation Reform Act of 1995 "to rein in terribly costly, frivolous class action lawsuits" brought under the securities laws. Permitting antitrust suits—which "yiel[d] treble damages, compared to the single damages available under the securities laws"—to be brought against underwriters for alleged conduct during public offerings that are closely regulated by the SEC and NASD "could devastate America's process of capital formation" and "accelerate the marginalization of our capital markets." Absent this Court's review, Commissioner Atkins warned, "[c]lass action suits based in antitrust law could be used to dismantle the system that has been developed over the years for getting IPOs efficiently and effectively to the market." Indeed, "[l]itigation risks" have already substantially "lessen[ed] the international appetite for our capital markets." Non-U.S. companies offering new stock have gone from raising "nine of every 10 dollars" in United States markets in 2000 to only one out of every 10 dollars raised last year.

Reiterating points made by the SEC in both courts below (see Pet. App. 124a-158a, 180a-198a), Commissioner Atkins cautioned that

> [s]yndicate underwriting of public offerings *inherently* involves agreements and joint actions among potential competitors, including agreements about price; but the underwriting process is extensively regulated by the SEC as well as by the NASD under SEC supervision. The practices in question [in this case] are governed by regulations crafted through a public process of notice-and-comment, with an appreciation for the effects on both capital formation and competition. An awkward antitrust overlay could disable the resulting finely tuned regulatory framework. For this reason, the SEC supported the underwriters' calls for dismissal of the suit on the basis of antitrust immunity.

(Emphasis original).

Implied immunity from private antitrust class actions does not mean, Commissioner Atkins emphasized, that underwriters can "act with abandon or collusion." "The SEC keeps vigilant watch over the IPO marketplace" and, along with "the NASD, can take action to prevent and punish abusive practices." It has done so "in cases dealing with the very practices at issue in *Billing*." In all these circumstances, "[t]he principles that [this Court] laid out in" *Verizon* v. *Trinko* "are directly on point": "when a detailed regulatory scheme exists, antitrust intervention offers only slight benefits and high potential costs."

In urging that this Court's review is necessary now, "[f]or the sake of stability in our capital markets," Commissioner Atkins observed that the "risks involved make *Billing* itself difficult to try rather than settle" and that review of the implied immunity issue will effectively be "barred" in the future if it is denied in this case. Accordingly, Commissioner

Atkins stated, this "Court needs to resolve the issue of anti-trust immunity before the plaintiffs' bar can wield its new weapon to strike a blow to the American capital markets."

CONCLUSION

For the reasons identified by SEC Commissioner Atkins, and those set forth in the petition for certiorari and reply briefs, the petition should be granted.

Respectfully submitted.

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JUNE 2006

ADDENDUM

[Wall Street Journal, June 10, 2006, Page A12]

A Serious Threat to Our Capital Markets

By Paul Atkins

In 2000, nine of every 10 dollars raised by non-U.S. companies through new stock offerings were raised in the U.S. Last year the reverse was true: nine of every 10 dollars were raised abroad. Many fear that these figures indicate that the U.S. has lost its position as center of the world's capital markets. Litigation risks and burdensome regulations, including out-of-control paperwork and accounting requirements under Section 404 of the Sarbanes-Oxley Act, lessen the international appetite for our capital markets. To help combat this negative image, the Securities and Exchange Commission has pledged to take steps to address the Section 404 regulatory overload. We have to leave fixing the overall litigation environment to Congress and the courts.

A serious threat to the capital markets, however, looms in the form of a class action lawsuit that is now at the doorstep of the Supreme Court. This suit seeks to trump the securities laws with the antitrust laws. At risk are the cautious reforms that Congress painfully passed in 1995 to try and rein in terribly costly, frivolous class action lawsuits. If this legal gambit is not turned back, it could devastate America's process of capital formation, wreak unprecedented havoc on the underwriting business, and accelerate the marginalization of our capital markets.

The lawsuit is *Billing v. Credit Suisse First Boston, et al.* The *et al.* among the defendants is virtually the entire investment banking industry.

Billing alleges violations arising from the underwriters' efforts while taking public hundreds of technology companies in the late 1990s. The plaintiffs bought stock primarily in the IPO aftermarket; they blame the losses that they suf-

fered when the technology bubble burst in 2000 on the underwriters' allegedly anticompetitive practices in marketing the IPOs.

If securities claims can be restructured as antitrust claims, as the plaintiffs seek to do in this case and other similar ones, Congress's clear intent to block abusive suits will once again be thwarted. Syndicate underwriting of public offerings *inherently* involves agreements and joint actions among potential competitors, including agreements about price; but the underwriting process is extensively regulated by the SEC as well as by the NASD under SEC supervision. The practices in question are governed by regulations crafted through a public process of notice-and-comment, with an appreciation for the effects on both capital formation and competition. An awkward antitrust overlay could disable the resulting finely tuned regulatory framework. For this reason, the SEC supported the underwriters' calls for dismissal of the suit on the basis of antitrust immunity.

By asserting that underwriters should be immune from antitrust challenges by the plaintiffs' bar, the SEC was not suggesting that underwriters are entitled to act with abandon or collusion. The SEC keeps vigilant watch over the IPO marketplace. We and the NASD can take action to prevent and punish abusive practices among securities dealers in the marketplace. Indeed, we have done so in the past, most notably in the 1990s, when the SEC attacked collusion in pricing in the over-the-counter marketplace; and we are continuing to do so in cases dealing with the very practices at issue in *Billing*.

The federal district court decided that there was antitrust immunity and dismissed the case, but the Second Circuit Court of Appeals reversed the decision. Now the Supreme Court is being asked to take up the question. For the sake of stability in our capital markets, I hope that it will do so. The principles that the Supreme Court laid out in its recent *Veri-*

zon v. Trinko decision are directly on point. In that case, the Supreme Court explained that, when a detailed regulatory scheme exists, antitrust intervention offers only slight benefits and high potential costs.

But if the decision of the Court of Appeals is permitted to stand, the reverberations will be widespread. Class action suits based in antitrust law could be used to dismantle the system that has been developed over the years for getting IPOs efficiently and effectively to the market. And as a practical matter, if the Supreme Court declines to hear the appeal, it may well be deciding the future of this and all cases like it.

The risks involved make *Billing* itself difficult to try rather than settle. Moreover, the kind of preemptive appeal that the defendants are making is barred once the Supreme Court has ruled that a particular kind of case can be taken to trial. The stakes are especially high here because antitrust liability yields treble damages, compared to the single damages available under the securities laws. The Supreme Court needs to resolve the issue of antitrust immunity before the plaintiffs' bar can wield its new weapon to strike a blow to the American capital markets, which already are suffering under the weight of new regulatory burdens.

Mr. Atkins is a commissioner of the SEC.